ZIMBABWE REVENUE AUTHORITY TRADE UNION
and
ZIMBABWE REVENUE AUTHORITY
NATIONAL WORKER'S UNION COMMITTEE
versus
THE PUBLIC SERVICE COMMISSION
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 18 February 2014 and 14 May 2014

Opposed Matter

Advocate V. Chingwena, for the applicant
M. Chimombe, for the 1st respondent
Advocate T. Magwaliba, for the 2nd respondent

MTSHIYA J: In this application the applicants seek the following relief:

"IT IS ORDERED THAT:

1. The 1st and 2nd Applicants' members are declared to be entitled to compensation or recognition of the years of service served under the 1st Respondent, either through monetary compensation or by crediting the years of service to their current employment by 2nd Respondent.

2. The 1st and 2nd Respondent's refusal to recognise or compensate Applicant's members is hereby declared to be unfair labour practice.

3. It is hereby further declared that the 1st and 2nd Respondents both or either one of them is liable to compensate all 1st and 2nd Applicants' members' years of service under the 1st Respondent.

4. The Respondents shall bear costs of this application."

It is common cause that members of the applicants were at one time employed by the first respondent. However, at the creation of the second respondent in 2001 members of the applicants were 'transferred' to the second respondent. It is alleged that the second respondent then refused to recognise the years of service the members of the applicants had

rendered to the first respondent. The second respondent offered the former employees of the first respondent new contracts of employment without taking into account their years of service under the first respondent. The issue is, who, between the first and second respondents should compensate the said employees. The Labour Court has, however, already ruled that the second respondent should recognise the years of service of all former employees of the first respondent. That judgment however, is still the subject of an appeal in the Supreme Court.

A number of preliminary issues were raised by the respondents but the most important issue was the issue of *lis pendens* raised by the second respondent. A determination of that issue, in my view, will dispose of this matter.

At the close of the hearing of this matter, I directed the applicants to later furnish the court with proof that the matter was not pending in any other court. The second respondent had submitted that the matter was pending in the Supreme Court (i.e. *lis pendens*).

On 19 February 2014, the applicants duly filed for my attention a bundle of documents in order to prove that the matter is not pending in any court. Amongst the documents filed there was a notice filed in the Supreme Court by the second applicant on 13 March 2012. The notice read as follows:-

> "**NOTICE OF ABANDONMENT**
>
> **TAKE NOTICER THAT** the Respondent herein abandons the Judgment in case No **LC/H/283/2009** subject to appeal **SC 284/11** and **SC 263/09**
>
> **FURTHER TAKE NOTICE THAT** the abandonment is subject to respondent initiating new proceedings on the same subject but with correct citation of parties.
>
> **FURTHER TAKE NOTICE THAT** each party bears its own costs." (My own underlining)

The second applicant herein was the respondent in the Supreme Court cases referred to above.

There was, in the same bundle of documents, a Labour Court judgment dated 12 May 2010, which in essence, was a confirmation of an arbitral award which read as follows:-

> "(i) ZIMRA should recognise the qualifying service of all former employees of the Department of Customs and Taxes that are currently employed by ZIMRA from the date of inception of ZIMRA in 2001.

(ii) Any failure to do so would constitute an unfair labour practice.

(iii) The Public Service Commission together with ZIMRA were to do such commutation which was to be verified by the workers committee within 30 days of the receipt of this judgment."

Indeed, before both the Arbitrator and the Labour Court the subject matter was the same and it remains the same *in casu*.

On 2 October 2010 the Labour Court granted the second respondent herein leave to appeal against its judgment confirming the above arbitral award. The second respondent proceeded to file its appeal in the Supreme Court on 4 November 2010. I have not, as I write this judgment, been advised on the fate of that appeal except to note that, although the Labour Court Judgment was in its favour, the second applicant has "abandoned" it. Apart from s 41 of the Magistrate Court Act [*Cap 7:10*] which provides as follows:

"**Abandonment of whole or part of judgment appealed against**

The following provisions shall apply in civil cases where an appeal has been noted, except in defamation or seduction cases-

(a) the respondent in any appeal may, by notice in writing to the appellant and the clerk of the court, abandon the whole or any part of the judgment against which such appeal is noted;
(b) where the party abandoning any judgment in terms of paragraph (a) was the plaintiff or applicant, judgment in respect of the part abandoned shall be entered for the defendant or respondent with costs;
(c) where the party abandoning any judgment in terms of paragraph (a) was the defendant or respondent, judgment in respect of the part abandoned shall be entered for the plaintiff or applicant in terms of the claim in the summons or application;
(d) a judgment entered in terms of paragraph (b) or (c) shall have the same effect in all respects as if it had been the judgment originally pronounced by the court in the action or matter.", I have not been able to find under our statutory law any provision allowing for such abandonment.

I believe, however, that under common law it is possible to do so, but such a judgment would remain intact but incapable of execution. *In casu* the second respondent has not abandoned its appeal in terms of the Rules of the Supreme Court, 1964. There was no cross appeal that the second applicant can claim to have abandoned. The said rule provides as follows:

"37. Abandonment

(1) An appellant may at any time abandon an appeal by giving notice to

that effect to the registrar and to the respondent.

(2) A respondent may, upon receipt of a notice in terms of subrule (1), make application to a judge for an order in respect of any costs incurred by him, including the costs of any cross-appeal:
Provided that where a respondent claims the costs of a cross-appeal in terms of this subrule, the cross-appeal shall, thereby, be deemed to have been abandoned.

(3) An appellant in a cross-appeal may at any time abandon a cross-appeal and, except in the case where a cross-appeal is deemed to have been abandoned by virtue of the provisions of subrule (2), the respondent in the cross-appeal may thereupon claim his costs by making an application to a judge for an order in respect of any costs incurred by him by virtue of such cross-appeal.

(4) If on the abandonment of an appeal by an appellant the respondent who has noted a cross-appeal wishes to persist in his cross-appeal, such respondent shall be regarded as the appellant for the purposes of the preparation of the record and the prosecution of the appeal.

(5) A registrar shall notify the registrar of the court appealed from an abandonment of an appeal or cross-appeal in terms of this rule.

In the circumstances the judgment of the Labour Court remains extant until set aside by the Supreme Court.

As already stated, the Labour Court judgment dealt with the same subject matter that is now before this court. The citation of additional parties and the rewording of the relief sought does not, in my view, change the subject matter and the relief sought. In fact, the relief sought is no different from the one the applicant was seeking from both the Arbitrator and the Labour Court. A competent court has therefore already made a ruling on the subject matter that this court is now being invited "to make an opinion on." That cannot be.

Section 124 of the Labour Act [*Cap 28:01)* provides as follows:

"**Protection against multiple proceedings**

(1) Where any proceedings in respect of any matter have been instituted, completed or determined in terms of this Act, no person who is aware thereof shall institute or cause to be instituted, or shall continue any other proceedings, in respect of the same or any related matter, without first advising the authority, court or tribunal which is responsible for or concerned with the second-mentioned proceedings of the fact of the earlier proceedings." (My own underlining)

As the law above provides, the earlier proceedings on the same subject matter were completed by a competent court. It is therefore clearly beyond this court to deal with the same subject matter for the same relief. The applicants have, on their own volition, decided not to take advantage of the relief granted them by the Labour Court (i.e they have waived their right to execute on that judgment).

Furthermore, the second respondent's right to be before the Supreme Court cannot be interfered with. The applicants cannot abandon the appeal on behalf of the second respondent.

Given the fact that the second respondent has not abandoned its appeal it means that the appeal is still pending in the Supreme Court between the same parties on the same cause of action. This application is also based on the same subject matter and the relief sought has not changed due to the addition of the first respondent.

This application cannot therefore succeed.

The application is dismissed with costs.

Messrs Matsikidze & Mucheche, Applicant's Legal Practitioners
The Attorney General, Civil Division, 1st Respondent's Legal Practitioners
Messrs Sinyoro and Partners, 2nd respondent's Legal Practitioners